

Appendix C

**NOAA Fisheries Memorandum
Providing Guidance on
Conferencing on Proposed Critical Habitat**



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Southwest Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802-4213
Tel (562) 980-4197 Fax (562) 980-4027

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MEMORANDUM FOR: NOAA Fisheries, Southwest Region
Protected Resources Staff

FROM: Penny Ruvelas, SWR Section 7 Coordinator

SUBJECT: Guidance on Conferencing on Proposed Critical Habitat

On December 10, 2004, NOAA Fisheries Southwest Region proposed critical habitat for two evolutionarily significant units (ESUs) of Chinook salmon and five ESUs of anadromous steelhead. NOAA Fisheries is required to publish its final rule by mid-August 2005. In accordance with 50 CFR 402.10, action agencies are required to *confer* with NOAA Fisheries if they determine that a Federal action under their discretion would “result in the destruction or adverse modification of proposed critical habitat.” Approximately 30 days after the final rule is published (mid-September 2005) it becomes effective and action agencies will be required to *consult* on proposed actions and reinitiate consultation for ongoing Federal actions that “may affect” designated critical habitat. Reinitiation of an existing consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if a new species is listed or critical habitat designated that may be affected by the action (50 CFR 402.16(d)).

After the final rule becomes effective, all ongoing actions, actions currently undergoing consultation, and actions proposed for consultation during the next six months should be fully compliant with section 7(a)(2). The change in threshold from “adverse modification” for a conference to “may affect” for consultation can surprise action agencies and applicants, and result in significant, time-sensitive bottlenecks, unless NOAA Fisheries and the action agencies are able to develop effective conferencing and reinitiation strategies during the six-month conference period.

The following guidance discusses approaches to conferencing and reinitiation of existing consultations for various categories of actions. For further assistance, please contact your Office Section 7 Coordinator or me. The 1998 *Endangered Species Consultation Handbook* also includes some helpful information in Chapter 6.

Proposed Actions

For actions about to enter into formal or informal consultation, or those that are in the very early stages of consultation, action agencies and applicants are encouraged to consider the effects of their action on proposed critical habitat in any biological

assessments/initiation packages being prepared for listed species and designated critical habitat. This will avoid the possibility of needing to revisit these actions when the threshold changes to may affect for consultation. This applies to actions that are likely to be ongoing when the final rules take effect. This also applies to actions that result in environmental changes and effects felt after completion of construction and after the final rules take effect, where discretionary Federal agency involvement or control over the action has been retained.

Projects Currently Under Consultation

For projects already under consultation, NOAA Fisheries and the action agency should work together to determine whether the current consultation can be modified to include conferencing on proposed critical habitat. Another alternative would be to develop a plan to reinitiate the consultation in a timely manner to address critical habitat issues once the final rules become effective. This latter approach is likely more feasible for consultations nearing the end of their time period, but in all cases, staff should give careful consideration to how much additional work might be necessary to complete a conference at this time. For example, because many of our salmon consultations focus on project impacts to habitat, only a small amount of additional work may be necessary to complete an adverse modification analysis. Taking some extra time now may be preferable to the time and uncertainty that may be involved in reinitiating the consultation once the rules become effective.

Ongoing Actions

Many ongoing actions with continuing Federal discretion may be out of compliance with the section 7 regulations at the time the final critical habitat rule becomes effective (mid-September 2005) unless we develop strategies to efficiently reinitiate consultation. This can be a significant issue for Federal land managers and agencies involved in long-term water development and use projects, transportation projects, and agencies and applicants operating under existing programmatic consultations. Failure to proactively address the need for reinitiation of consultation on these ongoing actions can lead to a time-sensitive workload for NOAA Fisheries and the action agencies, and added delays and uncertainty for applicants.

NOAA Fisheries staff that is aware of ongoing actions that will require reinitiation of consultation once the final rules take effect should notify the action agency of this upcoming responsibility and offer assistance in developing strategies to efficiently address the consultation requirement. Because this may still result in a large and time-sensitive workload, office supervisors and team leaders are encouraged to develop lists of actions requiring reinitiation and prioritize those actions that can be addressed quickly or that need the most time or resources.

Action agencies should review their ongoing actions, including programmatic actions, in cooperation with NOAA Fisheries to determine which actions require reinitiation of consultation to include effects on proposed critical habitat. A possible strategy to

streamline the process may be to reinitiate consultation on batches of similar or related actions in order to reduce documentation and workload and increase efficiency.

Finally, action agencies and NOAA Fisheries should not invest staff time evaluating effects of actions on proposed critical habitat that will be complete prior to the final rule becoming effective (mid-September 2005) or for actions where the Federal agency will not retain oversight or discretionary control over the action after the final rules take effect.

Preparation of Documents

If a request for consultation includes consideration of proposed critical habitat, NOAA Fisheries staff shall prepare joint consultation/conference documents in response. These include NLAA letters and biological/conference opinions. Conferencing documents are essentially identical to consultation documents, with some wording changes. The Regional and Office Section 7 Coordinators can provide assistance and offer guidance in the preparation of these documents.